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No. 86-467

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

CARL E. LANGLEY, WILBUR E. BOND,
Petitioners,

vs.

JOHN B. YOUNG,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION FOR REVIEW

IS THERE A "DE NOVO" APPELLATE REVIEW OF A § 1983 CIVIL RIGHTS JURY VERDICT?

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STATEMENT OF THE CASE

The Court of Appeals for the Sixth Circuit held that the Judgment of the District Court awarding damages to plaintiff-respondent was affirmed because the defendants-petitioners did not preserve for appeal the issues of excessive verdict, findings of the jury unsupported by evidence, a flawed jury verdict form, and respondeat superior liability.

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OPINIONS BELOW

Plaintiff-respondent, John B. Young, adopts the defendants-petitioners' recitation of Opinions Below.

———o———

JURISDICTION

Plaintiff-respondent, John B. Young, adopts the defendants-petitioners' Statement of Jurisdiction.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Plaintiff-respondent, John B. Young, adopts the citation of Constitutional and Statutory Provisions Involved.

———o———

SUMMARY OF PLAINTIFF-RESPONDENT'S ARGUMENT

Appellate review of Jury verdicts and claimed evidentiary defects is available only after the trial Judge has exercised his discretion in ruling on Motions for Directed Verdict, New Trial or Remittitur, or JNOV. No exception to this rule obtains in defamation cases involving First Amendment rights. In any event, this case was put to the jury by agreement of all parties as founded upon § 1983 of the Civil Rights Act of 1982. The failure of defendants-petitioners to pursue post trial motions in the Trial Court prevents appellate review of arguments as to evidentiary sufficiency for the verdict, or, the claim that "actual malice" must be proved in a § 1983 Civil Rights case.

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STATEMENT OF FACTS

Defendants-petitioners' statement of the case omits nearly all of the facts most detrimental to the defendants-petitioners. Several citations to the trial transcript are to unrelated issues or witnesses other than those persons identified. Since the essence of the defendants-petitioners' Petition is that the jury unwisely found the facts to be in plaintiff-respondent's favor, according to the agreed upon jury instructions, plaintiff-respondent restates the facts of the case without argument.

In December, 1980, John Young filed his three-count complaint against Carl Langley and Wilbur Bond. Count I alleged a violation of his civil rights under Title 42, § 1983 and § 1985. Count II claimed damages on the

pendant claim of outrage and intentional infliction of emotional distress. Count III claimed damages on the pendant theory of libel and/or slander.

The case was brought to trial in June, 1983. At the close of plaintiff-respondent's proofs, the defendants-petitioners moved for a directed verdict. The court granted defendants-petitioners' motion as to Counts II and III, and consolidated all of plaintiff-respondent's claims under a § 1983 theory. The defendants-petitioners proceeded to support their case with evidence. No further motion was made at the close of the proofs. The case was submitted to the jury with agreed-upon instructions. After several days of deliberation, the jury was unable to arrive at a verdict and the court declared a mistrial.

The case was called again for trial in January, 1985. John Young testified that he had been a deputy for 12 years. (T45, Vol.I) In early 1980, he began circulating nominating petitions for the office of sheriff. (T.50, Vol.I) Within a few weeks, Wilbur Bond, then Undersheriff, commented to Young that he was aware of a John Young circulating petitions. When Young confirmed this, Bond said "That's very interesting." (T.51, Vol.I)

Young further testified that in late April, while on duty, he received a radio call to go to a home about seven and one-half miles away, where a man had fallen from a roof. (T.55, Vol.I)

En route, his patrol car was nearly collided with by a motorist going through a stop sign. Young radioed the dispatcher, and his shift commander, Sgt. Art White, whose car was nearby, that he had a traffic stop and was

advised that Sgt. White would take over the call to the injury scene. (T.58, Vol.I) Young heard radio traffic that the ambulance had loaded the injured person and had departed the scene. After issuing a citation, Young went to the injury scene and, later, back to the jail complex. (T.61, 62, Vol.I)

That same day, Young left the jail complex at about 3:00 p.m., an hour earlier than the end of his shift. (T.65, Vol.I) It was the first occasion he had to leave work early. (T.64, Vol.I) He had telephoned Lt. Arnold, Commander of all road patrol officers, the previous evening and was given permission to leave early and instructed to inform his shift commander, Art White. (T.64, Vol.I) He informed Sgt. White that morning that he was leaving an hour early. (T.65, Vol.I) As he left Young saw Sgt. White and said "I'll see you later." To which White replied "Okay, have a good weekend." (T.66, Vol.I)

Young's ex-wife, a teacher at their daughter's school, had plans to re-marry that same weekend. (T.68-70, Vol.I) Young had visitation with his children that weekend and was unaware of his former wife's plans. (T.71, Vol.I) When calling her about his visitation, he learned that she was already living with a man, as reported to him by his children. (T.71, Vol.I) He took off work early to pick up his children to be interviewed by his attorney, Mr. Priesel. (T.73, Vol.I)

Upon arriving at his daughter's school, Young went to the principal's office. The secretary there directed him to his daughter's room. (T.6, Vol.III) The principal was making announcements over the public address system.

Upon arriving at the classroom, he identified himself as "Peggy Young's father, and I've come to pick her up." The teacher walked away, and Young left with his daughter. (T.8-9, Vol.II)

Four or five days later, Young was told of a meeting in Carl Langley's office, who was then Sheriff. (T.16, Vol. II) Langley told Young he had violated a city ordinance by taking his daughter out of school. And, that Wilbur Bond had written him up for failing to respond to an emergency. When Young tried to explain, Langley told him "I could bust you in the mouth . . . you're causing me a lot of problems." (T.17, 18, 21, Vol.II)

Langley took Young's police I.D. card, his service revolver, directed him not to wear his uniform in public, took him off road patrol and assigned him to work as a turnkey in the jail. He was sent directly home to get civilian clothes in the company of Wilbur Bond. (T.22, Vol.II)

En route to Young's home, Bond spoke of Young's candidacy for sheriff and Bond's drinking problems. (T.26, Vol. II) On the return to the jail complex, Bond told Young "You're going to be real sorry you took Carl and I on." After we win "you will not like being at the Lapeer County Sheriff's Department, and you won't even want to be living in Lapeer County when we're done with you." (T.27, Vol.II)

Young pursued union grievances, but to no avail. In the meanwhile he worked his assignment of turnkey. (T.28, Vol.I) About two months later, a prisoner escaped from the exercise yard. (T.31, Vol.II) Young was taking prisoners from their cells to the exercise yard while Marvin

North, a probationary new hire, was ordered by Sgt. Art White to stand armed guard on the outside of the fenced yard. (T.34, Vol.II) Sgt. White then radioed for Young to come to the front to process a prisoner being released. (T.39, Vol.II)

Just before that, Wilber Bond had walked up to Marvin North and begun talking with him. The two then walked away from the exercise yard to the garage area. (T.59-61, Vol.VI) One of the prisoners climbed over the fence. (T. 114, Vol.III) The prisoner was apprehended within an hour and a half. The locker-room discussion at the Sheriff's Department, after the prisoner was secured was "who was guarding?" Wilber Bond responded to this by chuckling "I guess I was." (T.81, Vol.II)

Young was directed to write two reports concerning the escape. The next time Young heard of the incident was a telephone call from Nancy Hale (Brown), a reporter for the Lapeer County Press two weeks later. She called Young for his reaction to being suspended as his punishment for allowing the escape. (T.48, Vol.II) She testified to hearing this in Carl Langley's office with Deputy Marvin North also being present. (T.45. Vol.II)

Wilber Bond then sent for Young and told him he was suspended for five days without pay for being responsible for the escape. (T.50, Vol.II) Two days later, the Lapeer County Press headline carried Young's suspension to the public along with the comment that "Sheriff Carl Langley charges him with failure to respond to an emergency, leaving work without permission and behavior unbecoming an officer. He has ordered Young not to carry his gun while off duty and transferred him from road patrol to

jail duty." (T.52, Vol.II); Exhibit 1—21,000 copies of the paper were printed.

Young was called a "political prisoner" by his fellow deputies and heard people in the community talking about him from coffee shops to his daughter's classmates. (T.53, Vol.II) After losing in the August primary, he was finally returned to road patrol duty at the end of September, 1980. (T.56, Vol.II)

Nancy Hale (Brown), the reporter, couldn't remember from whom she first learned of the suspension. (T.89, 91, Vol.II), but did remember Carl Langley telling her of Young's charges of failure to respond to an emergency, behavior unbecoming an officer and leaving work without permission. (T.92, Vol.II) She also remembered receiving letters from prisoners in the jail blaming the jail escape on John Young. (T.95, Vol.II)

Gregory Eberhard, one of those prisoners, testified that Carl Langley, on two or three occasions asked him and other prisoners to write letters to the Press blaming Young for the escape. (T.89-90, Vol.III) This was further corroborated by John Raymond, another prisoner, who said the same thing, (T.119, 120, Vol.III) and corroborated further still by Deputy North, in whose presence Langley solicited the letters. (T.37-39. 50, Vol.III)

Plaintiff-respondent's case was further buttressed by Det. Lt. Fahling of the Michigan State Police, an expert on police radio traffic. He listened to the copy of the dispatcher's tape sending John Young to the scene of the fall and the taking over of that dispatch by his shift commander, Art. White. Det. Lt. Fahling's opinion was that Young

was justified by what he heard on the tape in continuing with the stop of the motorist that had almost struck his patrol car. (T.32, Vol. IV)

Young's union steward, Det. Philip Thick, testified that the official reports made by himself and others in the department called for no disciplinary action against Young for the incidents claimed: leaving work early, conduct unbecoming an officer, and failing to respond to an emergency call, (T.98, Vol.IV), and clipped the newspaper announcement of Young's candidacy to include in his union file pertaining to the grievances Young made to Langley's discipline of him. (T.114, 115, Vol.IV)

At the close of plaintiff-respondent's case, the defendants-petitioners moved for a directed verdict on the ground that evidence was insufficient that charges against Young were false, and that for two of them, Sgt. Art White had been the initiator. (T.3-8, Vol.V) The court denied the motion. (T.9, Vol.V)

The defendants-petitioners called Sgt. Art White, who tried to explain why he did not go to the scene of the accident after telling Young "Ok, I'll slip out that way." (T. 86-87, Vol.V) and further, that although he (White) had told Young he could leave early, his understanding from Lt. Arnold was that permission had not been already given but depended upon his (Sgt. White) giving the okay. Because of his (White's) belief that Young had not talked to Lt. Arnold at all about leaving an hour early, a written report was made. (T.89-90, Vol.V) Sgt. White also said that Deputy North had been ordered by him to stand armed guard over the exercising prisoners and that he had not been given his permission to leave that post. On the other

hand, Young had been called by him over the walkie-talkie to come and process out a prisoner being released. (T.94, Vol.V)

Wilbur Bond was called next. First to explain his non-attendance at the trial (T.101-102, Vol. V), due to part time security officer work at a grocery store (T.17, Vol. VI), and then to state that he had only talked to Young about his candidacy for sheriff on two occasions (T.106-107, Vol. VI), and that when he got Sgt. White's report of Young leaving work early, he talked with Lt. Arnold and " . . . let the thing go . . . I dropped it." (T.108, Vol. V), " . . . it did become confusing as to who said what to who and who did or did not give him permission to go off duty early." (T.31, Vol.V)

Bond further explained his actions on the conduct-unbecoming-an-officer charge. After reviewing both Det. Thick's report and the follow-up report of Det. Lt. Parks, he went to see the sheriff (Langley). "We determined . . . he had broken a law . . . he couldn't be inside the school without the permission of the principal and that he had never obtained . . . (it)," (T.110, Vol.V) due to the principal talking on the public address system at the time. (T.42-44, Vol.VI) When pressed, Bond charged that Young had taken his daughter before school was out and against teacher objection, even though neither investigative report mentions teacher opposition and Bond himself had no contact with the teacher. (T.45, Vol.VI)

On the failure to respond to an emergency charge, Bond, after listening to the dispatcher's tape recording of the radio traffic (T.113, Vol.V) wrote that ". . . there seemed to be some confusion as to who was to complete the

assignment . . .'' (T.18, Vol.VI), but nevertheless cited Young with a violation of department orders, Exhibit II. He was given a written reprimand. (T.19-21, Vol.VI)

Bond's version of Young's leaving work early charge was that Sgt. White '' . . . advised that he had not given the officer permission . . .'', Exhibit 5 (T.29, Vol.VI), and denied having ever seen Sgt. White's report, Exhibit F, saying that permission had been given. (T.30, Vol.VI)

Bond concluded that Young was not disciplined for these items (T.48, Vol.VI), but, rather, his off-duty I.D. and uniform was taken along with his assignment as a turnkey '' . . . for the Department's better management . . .'' (T.49, Vol.VI) Bond then changed his testimony to say that Young was given a five-day suspension for the school incident. (T.49-50, Vol.VI)

Mr. Langley next testified that Young was reprimanded for failing to take a call (T.81, Vol.VI), at Bond's recommendation (T.82, Vol.VI), and, also, that the placement of Young in the jail as a turnkey was initiated by Bond. (T.103, Vol.VI)

Langley was forced to recant his denial of previous political discipline and admit that when another deputy charged him with wrongdoing, he told the newspapers that the motive was purely political. (T.15, Vol.VII) But, generally, Langley denied any political motive in his disciplining of Young. (T.20, Vol.VII)

Det. Lt. Gary Parks, Internal Affairs Officer, testified in rebuttal. First, to contradict Langley's denial that Bond had been directed to go to an alcohol abuse center (T.125, Vol.VI) and then, as to having Mr. Bond brought

in to him while intoxicated and driving a Sheriff's Department car. (T.12,13, Vol.VII)

Lt. Parks said that he had personally taken the inebriated Mr. Bond in to Mr. Langley (T.24,25, Vol.VIII) and that Langley had told him Bond and his wife were going for counseling. (T.26, Vol.VII) Lt. Parks further contradicted Langley's denial that when questioned by the Lapeer County Press about another deputy's actions, he had suspended the deputy to avoid embarrassment. (T. 12, Vol.VII) Lt. Parks testified that Langley took the deputy to a bar for the day to smooth over the suspension " . . . he was talked into . . . and that if we tried to clarify it . . . the whole department (would) look even worse . . ." (T.28, Vol.VII) Lt. Parks concluded that Mr. Langley is " . . . not necessarily truthful." (T.42, Vol.VII)

When the case was in, no further motions were made, and the motion for directed verdict made at the close of plaintiff-respondent's case was not renewed. (T.62, Vol. VII) The court instructed the jury and no objection to the instructions was raised by either side. (T.184, Vol. VII) The jury returned their verdict on the stipulated form in favor of the plaintiff-respondent in the amount of $350,000.00 compensatory damages and $400,000.00 punitive damages, jointly and severally. The defense polled the jury. Judgment was entered on January 29, 1985, pursuant to Rule 58.

No further motion was made under Rule 50, Rule 59, or Rule 62.

Langley and Bond filed their Notice to Appeal on February 28, 1985, to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed the Judgment.

ARGUMENT

No Writ of Certiorari should be issued since the Sixth Circuit Court of Appeals followed well settled precedent in declining to review issues of fact decided by the jury when the defendants-petitioners never asked the trial judge to address the arguments urged on appeal. Secondly, there is no conflict among the circuits on this point, but, rather, agreement as well as being in harmony with FRCP 50,51 and 59. Third, there was evidence from which a jury could find, directly and inferentially, that the defendants-petitioners "knew" the falsity of the charges made against plaintiff-respondent.

The defendants-petitioners did not preserve for appellate review the factual issues with which they disagreed on the Jury Verdict and Findings.

Wright & Miller, § 2534 discuss FRCP 50:

> Technically a party waives his right to a directed verdict, if the motion is made at the close of his opponent's case, and thereafter he introduces evidence in his own behalf. However, he may renew the motion at the close of all the evidence. If the party fails to renew the motion he may not move for judgment notwithstanding the verdict nor may he claim error on appeal from denial of the motion at the close of the opponent's evidence. (Citing *Demeen v. Baltimore & O.R. Co.,* D.C.W.Va. 1946, 68 F. Supp. 148; *Gillentine v. McKeand,* C.A.1st, 1970, 426 F.2d 717, 722-723; *Budge Mfg. Co. v. U.S.,* C.A.3d, 1960, 280 F.2d 414; *American Nat. Bank & Trust Co. v. Dean,* C.A.6th, 1957, 249 F.2d 82; *Home Ins. Co. of New York v. Davila,* C.A.1st, 1954, 212 F.2d 731; *Auto Transp., Inc. v. Potter,* C.A.8th, 1952, 197 F.2d 907; *Meier & Pohlmann Furniture Co. v. Troeger,* C.A. 8th, 1952, 195 F.2d 193; *Capital Transp. Co. v. Compton,* C.A. 8th,

1951, 187 F.2d 844; *Hart v. Grim, Empire State Ins. Co., Intervenor,* C.A. 8th, 1950, 179 F.2d 334; *Minnehaha County, South Dakota v. Kelley,* C.C.A. 8th, 1945, 150 F.2d 356; *R & R Associates, Inc. v. Visual Scene, Inc.* C.A. 1st, 1984, 726 F.2d 36, 38; *Special Promotions, Inc. v. Southwest Photos, Ltd.*, C.A. 5th, 1977, 559 F.2d 430, 432, citing Wright & Miller; *Pierce v. Lopez,* 1971, 490 P.2d 1182, 1184, 16 Ariz.App. 54, citing Barron & Holtzoff.)

No other Circuit Court has ruled to the contrary, and, therefore, there is no conflict among the circuits on this procedural point.

Morgan Electric Co. v. Neil, 198 F.2d 119 (CA9, 1952) has no application to this case. *Morgan* did not permit appellate review of claimed factual deficiencies when no post verdict or post trial motions are made. What *Morgan* did permit was a review of an Order on a Motion as to what affirmative defenses could be plead and argued in a breach of employment contract case.

> "[1] We agree with appellant that the effect of these rulings was to place on appellant the burden of proving not only that appellee had failed to follow appellant's instructions, but of further proving that Neill had 'expressly agreed' to follow these instructions as part of his contract of employment. The theory behind such a ruling is unrealistic and without substance in law. It overlooks the universally recognized law of implied promises. It is aptly summarized in 24 L.R.A.,N.S., 814:
>
> > 'The duty of a servant to comply with all lawful and reasonable orders given by his master with respect to the performance of such functions as fall within the scope of employment is one of those fundamental obligations which are deemed

> to be impliedly undertaken as an incident of every contract of hiring.'
>
> If it be true, as the stricken matter alleges, that Neill failed to follow instructions as therein particularly specified, then the rulings of the trial court in granting appellee's motions to strike imposed upon appellant an added burden of proof which the law does not impose."

The citation of *Morgan Electric Co. v. Neil,* supra, is inapposite for defendants-petitioners' conclusion that this Court should grant its Writ to now review issues of fact never brought before the trial judge after the case was completed or after the verdict of the jury.

Likewise, defendants-petitioners' citation of *Franki Foundation v. Alger-Rau & Assoc., Inc.,* 513 F.2d 581, 585, 586 (CA3, 1975) is misplaced. In *Franki,* the court vacated the judgment entered on the jury verdict because the jury verdict failed to answer Questions 3 and 4 as charged by the Court. The decision to vacate the judgment was reasoned as follows:

> For the trial judge to have entered judgment on the verdict, he apparently first either (a) supplied his own answer to Question 3, or (b) assumed that the jurors answered Question 3 in the negative, due to either its omissions or the belief that the need to answer this question had been eliminated by the jury's answer to Question 1. *Iacurci* indicates that either course would have been improper, 387 U.S. at 87, 88, 87 S.Ct. 1423, 18 L.Ed.2d 581. See also *Union Pacific Railroad Co. v. Bridal Veil Lumber Co.,* 219 F.2d 825, 831-32 (9th Cir. 1955), cert. denied, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 849 (1956)."

Having decided that the incomplete jury verdict required a new trial, the procedural problem was addressed

of motions for new trial and JNOV having been timely filed, but not briefed or argued due to counsel's absence from the case:

> "In the case now before this court, appellant's post-trial motions served this purpose by detailing objections to the court's judgment, including the failure of the jury to answer Question 3, notwithstanding the fact that appellant failed to completely prosecute the motions. Thus, this *issue of the failure to answer Question 3 is not raised for the first time on appeal.* The trial judge was aware of these objections at the time he denied appellant's motions, and he could have ruled otherwise. While a court is not obliged to examine grounds for post-trial motions which are advanced in detail therein, but neither briefed nor argued, courts have at times done so. See, e.g., *Solar Fuel Co. v. United Mine Wkrs. of Amer.*, 346 F.Supp. 789, 798 (W.D.Pa. 1972), aff'd 481 F.2d 1399 (3d Cir. 1973, cert. denied, 416 U.S. 909, 94 S.Ct. 1617, 40 L.Ed. 2d 114 (1974). Cf. *Clay v. Southern Railway Co.*, 284 F.2d 152, 154 (5th Cir. 1960)." (emphasis added)

In the case at bar, the verdict was fully delivered squarely against Langley-Bond. Unlike the defendants-petitioners in *Franki Foundation Co. v. Alger-Rau & Assoc., Inc.*, supra, no motion for a new trial or JNOV was filed. This citation does not support the conclusion that asking the trial judge to rule on alleged fact deficiencies is an "unnecessary task" for review on appeal. The right to appeal should not be confused with the scope of the issues properly reviewable on appeal. Otherwise, in every case where there is a claimed error or deficiency in the pleadings, discovery, admission of exhibits or testimony, the argument could be urged for the first time in Appellate Court briefs or in a Petition for Certiorari.

Langley-Bond seeks to justify all of their failures to address the trial court with the fact issues raised at the Sixth Circuit Court of Appeals, by concluding that they are entitled to a "De Novo" review of the entire case in this Honorable Court. As further addressed below, this, too, is addressed for the first time in this Court. Not only is there no decision of the Sixth Circuit to review, no court has ever held that § 1983 Civil Rights cases are entitled to a "De Novo" review on appeal, thus eliminating the "unnecessary task" of filing motions for Directed Verdict, New Trial or JNOV in the trial court.

The Citation of footnote 2, from the decision in *Sherill v. Royal Industries, Inc.*, 526 F.2d 507 (8th Cir.1975), by Langley-Bond is equally non-supportive of the "Conflict of the Circuits" claim. It is a curious inclusion, however, in their Petition for Certiorari to this court, since Langlay-Bond agreed to the jury instructions given in the case at bar. The text of the Opinion in *Sherill* under which footnote 2 was included flatly states:

> "All of the issues raised by appellant Sherill on this appeal relate to the instructions given to the jury by the district court.[2]"

It can readily be deduced that defendants-petitioners' reliance upon *Sherill* is misplaced.

Equally curious is defendants-petitioners' citation of *Colletti v. Credit Bureau Services, Inc.*, 644 F.2d 1148 (5th Cir.1981). *Colletti* is in harmony with and supports the holding of the Sixth Circuit in this case. In no way is *Colletti,* supra, an example of the defendants-petitioners' claim of the "conflict of the circuits." Even defendants-petitioners' quotation from Colletti is a paraphrase of Judge Keith's opinion in *Young v. Langley.*

The Opinion of the Sixth Circuit Court of Appeals discloses that Langley-Bond raised for the first time on Appeal the issues of a claimed excessive verdict, insufficient evidence, a flawed jury verdict form agreed to in the trial court, and a legal theory of respondeat superior. Since none of these arguments had been presented to the district judge who had presided over two trials, the Court of Appeals followed well settled precedent in holding that these factual issues had not been preserved for appellate review.

The thrust of defendants-petitioners' argument to this Court is to plead for a major alteration in the procedures of appellate review in this country by requiring the Circuit Courts of Appeal to wade through the transcripts and record of every § 1983 Civil Rights case tried to a District Court jury without the benefit of the trial judge's opinion.

> " . . . a De Novo review is necessary in cases of this nature, and to require the filing a (sic) post trial motions in such a case would be an unnecessary task." Petitioners Brief, page 9.

As though this proposal is not startling enough, a completely novel legal theory is asserted by defendants-petitioners, again, for the very first time in this Court. That new theory is that plaintiff-respondent's § 1983 Civil Rights case must prove "actual malice" as a necessary element.

Neither the district judge nor the Sixth Circuit Court of Appeals has ever addressed defendants-petitioners' claim that no evidence of "actual malice" was before the jury.

The district court was not asked to rule on whether plaintiff-respondent must prove "actual malice" because the plaintiff-respondent's defamation theory was eliminated during the first trial in 1983. If Langley-Bond seriously believed that "actual malice" was a required element of proof of plaintiff-respondent's claim, would not the efficient administration of justice require that defendants-petitioners urge the trial court to charge the jury on that legal theory? Or, at a minimum, that objections to the jury instructions be made on the record, per FRCP 51.

Instead, Langley-Bond agreed that the jury instructions were proper. After a thorough review of the record, the Sixth Circuit's decision noted:

> "When this case was first tried in 1983, the instructions to the jury, which included the verdict form, were agreed upon by the parties. Defendants did not make a motion objecting to the jury instructions during the intervening years and no objection was made to the jury instructions or verdict form used in the 1985 trial."

Langley-Bond now urge this "actual malice" requirement in § 1983 Civil Rights cases, citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984). *Bose* has no application to a § 1983 Civil Rights case. Even if it did, however, there was evidence of "actual malice," even though this issue has not been reached by either the trial court or the Sixth Circuit Court of Appeals.

Initially, *Bose* does not "obviate the necessity of post trial motions." The *Bose* decision does not even make mention of post trial motions, much less carve out a broad

exception to preserving evidentiary issues for appellate review as proposed by defendant-petitioner. Rather, the holding of *Bose* is that the decision of the First Circuit Court of Appeals reversing the trial court's Judgment for plaintiff-respondent was upheld as not limited by the clearly erroneous standard of FRCP 52. In *Bose,* however, the Trial Court, as well as the Circuit Court, confronted the issues of "actual malice" in the use of the word "about" to describe the defendant-authors' perception of sound from the BOSE 901 speaker system.

Mr. Justice Stevens, writing for the Court, said:

> "Here, however, adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities and descriptive challenges for the writer. (sic) *Time, Inc. v. Pape,* supra, 401 US, at 290, 28 L Ed 2d 45, 91 S Ct 633. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time . . . we agree with the Court of Appeals that the difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment."

Langley-Bond used no malapropisms in describing Young to the Lapeer Press reporter. The charges of failure to respond to an emergency, leaving work without permission, and behavior unbecoming an officer, as well as pinning the responsibility for the escape of a prisoner

emanated from Langley-Bond. It was these charges that were without foundation. These charges were then planted in the newspaper, both directly by Langley and by the guise of "leaks," through letters solicited by Langley from prisoners. The obvious effect of these "charges" was to cast Young, the would-be challenger, as a disinterested, insubordinate, and incompetent police officer. Additionally, when coupled with a report that the Sheriff had "ordered Young not to carry his gun while off-duty and transferred him from road patrol to jail duty" would leave any reader with the impression that Young had been confronted with the charges and found guilty. It was Young's voice as a candidate that was seeking "breathing space," to put his case against the Langley-Bond wrongdoings to the electorate.

Defendants-petitioners' analysis fails to take note that the gravamen of Young's case was not that the Langley-Bond "*statements* they allegedly made, when made, were false" but that it was their *actions* in visiting reprisals through false charges as Young's employment superiors. This *was* plaintiff-respondent's theory put to the jury. The jury questionnaire logically required the jury to find facts in favor of Young on each fact or set of facts. The jury found the facts in favor of Young. No motion challenging the sufficiency of the facts was made.

To escape the well settled law requiring trial court rulings to preserve factual sufficiency arguments for appellate review, *Bose* is urged to be expanded to give defendant-petitioners a "De Novo" review. Their failure to file post trial motions would be thereby excused. *Bose*, however, has never been construed to give defendants-

petitioners a second trial on the facts in the Supreme Court, even in defamation cases. Rather, it was the inherent balancing of the "good unto itself" of the freedom to speak and the "social interest in order and morality" and the limits of the application of general pronouncements that require the retention of appellate review of "constitutional facts." Mr Justice Stevens writing for the Court:

> "In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. The principle of viewpoint neutrality that underlies the First Amendment itself, see *Police Department of Chicago v. Mosley,* 408 US 92, 95-96, 33 L Ed 2d 212, 92 S Ct 2286 (1972), also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected. See generally, *Terminiello v. Chicago,* 337 US 1, 4, 93 L Ed 1131, 69 S Ct 894 (1949).

The *actions* of retribution by Langley-Bond for the exercise of Young's First Amendment rights were found actionable under § 1983 of the Civil Rights Act of 1982. Even though part of Young's damages was the reporting of

these retributions to the press, no issue of requiring Young to prove that retribution was performed with "actual malice" was asserted in the trial court or addressed by the Sixth Circuit.

Even though it is difficult to imagine how "retribution" could be accomplished without "actual malice," the defendants-petitioners here make no effort to confront the evidence put to the jury and demonstrate that their *actions* deserve constitutional protection. Rather, the conclusion is asserted that no evidence of "actual malice" was proved, and thus leaves it to this Honorable Court to plough through the record.

The Petition for Certiorari should be denied.

CONCLUSION

For the above reasons, the plaintiff-respondent, John B. Young, requests that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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